No. 84325-2

SUPREME COURT OF THE STATE OF WASHINGTON

SAMANTHA A.

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Appellant.

BRIEF OF *AMICUS CURIAE* COLUMBIA LEGAL SERVICES

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I. INTEREST OF AMICUS

Columbia Legal Services (CLS) is a non-profit law firm that protects and defends the legal and human rights of low-income people. As a member of the Alliance for Equal Justice, CLS represents people and organizations in Washington State with critical legal needs who have no other legal assistance available to them. CLS regularly undertakes representation of public assistance recipients and routinely requests attorneys' fees under RCW 74.08.080 when its clients prevail in such litigation. CLS does not charge its clients for its services.

The demand for CLS's services, like the demand for legal services from all nonprofit organizations that represent low-income people, far exceeds the capacity to meet that demand. One way in which CLS has been successful in expanding available resources is by collecting attorneys' fees in meritorious public assistance cases and using those funds to represent clients who would otherwise go unserved. CLS also refers public assistance judicial review cases to private attorneys and firms. The potential availability of attorneys' fees under RCW 74.08.080 as it has been construed for over sixty years is an important incentive for private attorneys to take these cases.

CLS routinely brings judicial review appeals on behalf of public assistance recipients that address systemic issues involving Department rules and practices. Capping attorneys' fee awards at $25,000 would mean that much of the work performed on judicial review for public assistance recipients would go uncompensated. CLS's ability, and the ability of private attorneys, to represent public assistance recipients would be seriously diminished if Washington courts embrace the Department's argument with respect to the award of reasonable attorneys' fees under RCW 74.08.080.

II. INTRODUCTION

Individuals who rely on the State for their most basic needs – medical and personal care, subsistence cash benefits, food assistance – have the greatest need for free legal assistance when the benefits that are their lifeline are threatened. They are our most vulnerable citizens. The Legislature recognized this when it authorized reasonable attorneys' fees for lawyers who represent public assistance appellants. These appellants, because they receive benefits based upon dire need, have no means to pay and retain an attorney. They must either rely on free legal aid organizations, like Columbia Legal Services and the Northwest Justice Project, or hope to find a private attorney willing to take their case on without pay.

In order to encourage such needed legal representation, the Legislature determined that attorneys who prevail in cases involving needs-based state services would be automatically entitled to their reasonable attorneys' fees. The law also has an additional deterrent effect, encouraging the State to resolve disputes involving public assistance recipients so that they are not erroneously deprived of subsistence benefits.

The Department now seeks to undo the effect of the public assistance fee-shifting statute. It argues that attorneys who take on this representation are not entitled to their reasonable fees if they prevail. Instead, the Department claims that another fee-shifting statute, one that does not apply to needs-based public assistance, should set the standard for the attorneys' fees in this matter.

This Court should reject this argument. The Department's statutory interpretation is unsupported by a plain reading of the relevant statutes and at odds with basic canons of statutory construction. But even more alarming, the Department's approach would undermine the Legislature's decision to encourage attorneys to take on the appeals of those who are most dependent on state benefits and least able to hire counsel. Attorneys who represent needs-based public assistance recipients are entitled to their reasonable attorneys' fees, without a cap, if they prevail.

III. ARGUMENT

A. The Public Assistance Fee-Shifting Statute, RCW 74.08.080, is intended to encourage representation of public assistance applicants and recipients.

This Court recently reiterated that it looks to the legislative purpose behind statutory attorney fees provisions. It found that the purpose of a fee-shifting provision in drug forfeiture cases was to "provide greater protection to people whose property is seized." *Guillen v. Contreras*, ---Wn.2d ---, ---P.3d---, 2010 WL 3504827 (2010). In making that point, the Court discussed the workers' compensation fee-shifting provision, saying:

> The purpose behind the award of attorneys fees in workers' compensation cases is to ensure adequate representation for [appellants] who were denied justice by the Department.

Citing *Brand v. Dep't of Labor & Indus.,* 139 Wn.2d 659, 667, 989 P.2d 1111(1999). The award of attorneys' fees in cases involving public assistance benefits, including the Medicaid benefits at stake here, is equally, if not more, important. Public assistance recipients are among our most vulnerable citizens.

RCW 74.08.080's attorney fee award language has not changed materially since it was first enacted in 1949 except to make provision for the possibility of a favorable court of appeals decision and, in 1998, to

change the location of the apostrophe in the word "attorneys".[1] Originally codified as RCW 74.02.07, the fee award statute provided:

> In the event that either the superior court or the supreme court renders a decision in favor of the appellant, said appellant shall be entitled to reasonable attorney's fees and costs.

"Statutory fee-shifting provisions have been enacted by the Legislature in numerous instances to encourage enforcement of public policy goals. Attorney fee awards are essential to encouraging private enforcement of key social policies." PHILIP A. TALMADGE AND MARK V. JORDAN, ATTORNEY FEES IN WASHINGTON, at 35 (2007). The Legislature's public assistance fee-shifting statute is intended to encourage lawyers to represent low-income public assistance recipients and applicants. Such representation, while important to the low-income client, also serves a significant public good. It both vindicates the client's interests, and at the same time, supports the public interest in avoiding erroneous deprivation of public assistance benefits and enforcing the public assistance statutes.

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[1] *See* Laws 1998, Chapter 79 § 15.

B. The Department's contention that EAJA applies to public assistance cases should be rejected.

1. The Legislature has not acted to impose EAJA limits on RCW 74.08.080.

The EAJA (the Equal Access to Justice Act) was enacted in 1995. RCW 4.84.350 *et seq.* The Department appears to suggest that, in the absence of case law interpreting RCW 74.08.080, the Legislature must have intended EAJA's caps on the amount of fees that could be awarded ($25,000) and the hourly rate used to compute an award ($150) to apply to public assistance judicial review cases. *See* Department's Reply at pp. 20-21 noting EAJA adopted in 1995 and that "EAJA is meant for the very circumstances of this case." But RCW 74.08.080 has been amended twice since EAJA's adoption. *See* Laws 1997, Chapter 59 § 12 and Laws 1998, Chapter 79 § 15. The Legislature could have amended RCW 74.08.080 to impose EAJA's limits, but has not chosen to do so.

The Department does not mention that EAJA places a significant hurdle before a party seeking attorneys' fees in cases against state agencies: the substantial justification requirement. *See* RCW 4.84.350(1). By contrast, the plain language of RCW 74.08.080(3) makes clear that the substantial justification requirement does not apply in a public assistance case. A court is *required* to award fees to a prevailing public assistance recipient and does not consider whether the Department's actions were or

were not substantially justified. The Department ignores EAJA's substantial justification requirement because it is directly at odds with RCW 74.08.080's requirement that reasonable attorneys' fees be awarded to a prevailing appellant in a public assistance judicial review.

The rules of statutory construction do not permit a litigant to pick and choose which parts of a statute might apply to modify another statute in a wholly separate Title of the Revised Code of Washington. If EAJA were meant for the very circumstances of this case as the Department contends, the Legislature would have taken action to ensure that the substantial justification requirement applied to public assistance judicial review cases by explicitly saying so, either in EAJA itself or by amending RCW 74.08.080. A statute must be read in its entirety, not piecemeal. *Donovick v. Seattle-First National Bank*, 111 Wn.2d 413, 415, 757 P.2d 1378 (1988).

2. The plain meaning of RCW 74.80.080(3) requires an award of reasonable attorneys' fees without reference to EAJA or good faith.

This Court has held, specifically with respect to fee-shifting statutes, that courts should use the lodestar method to calculate reasonable attorneys' fees when the fee-shifting statute at issue, like RCW 74.08.080, does not specify how the attorney fees award should be calculated. *See, e.g., Brand*, 139 Wn.2d 659, 666, 989 P.2d 1111 (1999) *citing Bowers v.*

Transamerica Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983). A court calculates the lodestar award by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Brand,* 193 Wn.2d at 666.

The Legislature is presumed "to be aware of judicial interpretation of its enactments," and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Riehl v. Foodmaker, Inc.,* 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King County Boundary Review Bd.,* 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). *Broom v. Morgan Stanley DW Inc.,* 169 Wn.2d 231, 238, 236 P.3d 182, 185 (2010) (Legislature's failure to provide further clarification following court decision suggests its approval of decision.) Here, the Legislature is presumed to be aware of court decisions applying the lodestar method to calculate fee awards when the fee-shifting statute does not specify the calculation method. Since the Legislature has taken no action to amend RCW 74.08.080 to include more specific language that would impose EAJA limits on RCW 74.08.080 fee awards, EAJA cannot apply.

The Department also seems to raise a "good faith" argument as a justification for this Court imposing EAJA's limits on RCW 74.08.080(3). Department's Reply Brief at pp. 21-22. This position ignores the first rule

of statutory construction. In any question of statutory construction, a court strives "to ascertain and give effect to legislature's intent." *Chadwick Farms v. FHC*, 166 Wn.2d 178, 186, 207 P.3d 1251 (2009). If the "statute's meaning is plain on its fact, then the court must give effect to that plain meaning ..." *Id.* The attorneys' fees provision of RCW 74.08.080(3) is clear. Successful appellants are entitled to reasonable attorneys' fees. The statute is clear on its face: there is no requirement that a prevailing appellant show the Department was not acting in good faith. *Blade v. DSHS*, 25 Wn.App. 630, 634, 610 P.2d 929 (1980) (Bad faith is not a prerequisite to award of attorney's fees under RCW 74.08.080(3). All that is required is favorable court decision.)

The Department argues that no court has held that the fee award provision in RCW 74.08.080 is designed to be both punitive and deterrent since *Berry v. Burdman,* 93 Wn.2d 17, 24, 604 P.2d 1288 (1980).[2] Department's Reply at p. 20. In the years following *Berry*, however, many appellate courts awarded reasonable fees to public assistance appellants who prevailed against the Department – results in keeping with the plain

[2] The *Berry* opinion did not discuss on what basis the Department was contesting the award of reasonable attorneys' fees. A review of the Department's briefing in *Berry* reveals that it offered an unsuccessful "good faith" defense. *See* Appendix A, p. 2 and pp. 23-24 (Department's Opening Brief in *Berry*) and Appendix B, p. 38. (Excerpt from Respondents' Brief.) The public assistance recipients in *Berry* were, like Samantha A., alleging that Department rules violated federal law. *Berry* at 18. And, like Samantha A., the *Berry* case arose following judicial review of administrative hearing decisions in superior court. Appendix A, p. 5.

language of the statute and with *Berry*.[3] To the best of amicus' knowledge, the Department has not advanced an argument that EAJA limits apply to attorney fee awards under RCW 74.08.080(3) before an appellate court until now.

3. Public assistance cases, because they are needs-based, are different from cases involving DDD eligibility.

The Department's argument that Samantha A.'s reasonable attorneys' fees should be capped, pursuant to RCW 4.84.350(2), is a red herring. This is not a case about whether Samantha A. is or is not developmentally disabled. It is not relevant that she would have had her attorneys' fees capped if she was appealing from a DDD determination that she was not developmentally disabled. Department Reply Brief at p. 20.

Eligibility for Medicaid Personal Care (MPC), the service at issue here, is based on financial need. Samantha A.'s claims that the Department's rules violate federal law would exist even if she was not developmentally disabled.[4] Any child or adult who receives MPC is

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[3] *See, e.g., Jenkins v. DSHS,* 160 Wn.2d 287, 157 P.3d 388 (2007); *Jacquins v. DSHS,* 69 Wn.App. 21, 31, 847 P.2d 513 (1993); and *Kramerevcky v. DSHS,* 64 Wn.App. 14, 27, 822 P.2d 1227(1992). Amicus represented two of the three *Jenkins* respondents before this Court as well as below. The Department did not make the EAJA cap argument at any phase of the *Jenkins* litigation.

[4] A Department rule provides that the Department's Division of Developmental Disabilities (DDD) conducts the CARE assessment for *all* children who receive MPC

entitled to reasonable attorneys' fees under RCW 74.08.080 if they prevail in a case involving that program on judicial review.

A person of any income may apply for a determination that he or she is developmentally disabled as defined in RCW 71A.10.020(3). DDD's determination that a person is developmentally disabled opens the door for services. *See* RCW 71A.16.020. Some of those services are needs-based public assistance services and some are not. Samantha A.'s MPC services fall into the former category – they are needs-based public assistance services.[5] Medicaid services are *always* contingent on meeting financial qualification rules. *See, e.g.,* RCW 74.09.010(9) (statutory definition of "medical assistance"), RCW 74.09.510 (eligibility for medical assistance), and RCW 74.09.520(1)(l) (includes personal care services under medical assistance scope of care and services.)

The distinction between determining eligibility for DDD services and determining eligibility for public assistance services is discussed in *Johnstun v. DSHS*, 53 Wn.App.140, 144-145, 766 P.2d 1104 (1988). The *Johnstun* court noted that while financial need is *not* a factor in

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services without regard to the determination that the child meets DDD eligibility requirements. *See* WAC 388-106-0060. In other words, DDD conducts the CARE assessment for children who have disabilities – developmental or otherwise.

[5] Other services for persons with developmental disabilities administered by DDD are provided irrespective of financial qualification. Those services are not at issue here.

determining eligibility for developmental disability services, it is *always* a factor in determining eligibility for public assistance services. *Id.* at 143. In Samantha A.'s case, the Department made two separate eligibility determinations. It determined she was developmentally disabled pursuant to the definition of developmental disability found in RCW 71A.10.020(3). It *also* determined that she was eligible for MPC, a public assistance service. The *Johnstun* court recognized the possibility of this exact scenario, i.e., that a developmentally disabled person could be eligible for public assistance services *and* services not based on financial need. *Id.* at 144, FN 1 ("Of course, one could be eligible for both kinds of services.") The *Johnstun* court noted that while the appeal process could impose heavy financial burdens on persons seeking a determination they were developmentally disabled, the Legislature had "not seen fit to provide such applicant with the right to recover their costs and attorney's fees." *Id.* at 145. Instead, the reasonable attorneys' fees provision of RCW 74.08.080 applied only to "financial need-based public assistance eligibility decisions." *Id.* at 143.

There is clear precedent for Samantha A.'s position. Samantha A. seeks a declaration that Department rules violate federal law. The posture of her case before this Court is the same as the case of *Jenkins v. DSHS*, 160 Wn.2d 287, 157 P.3d 388 (2007). The services she seeks are the same

kind of Medicaid-funded services sought by the *Jenkins* respondents, namely, MPC services. She asks this Court, as did the *Jenkins* respondents, to affirm a lower court decision declaring Department rules invalid because those rules violate federal law. She has gone about prosecuting her case in exactly the same fashion as the *Jenkins* respondents did. Just like the respondents in *Jenkins,* she is entitled to reasonable attorneys fees pursuant to RCW 74.08.080, should she prevail.

IV. CONCLUSION

Attorney fee awards under RCW 74.08.080 are essential to advocacy for public assistance appellants in judicial review proceedings.

This Court should reject the Department's argument that it read EAJA's limits into RCW 74.08.080.

RESPECTFULLY SUBMITTED this 8th day of October, 2010.

Attorney for Amicus Columbia Legal Services:

COLUMBIA LEGAL SERVICES
Amy L. Crewdson, WSBA # 9468

PROOF OF SERVICE

I certify that I hand-delivered a true and correct copy of the foregoing Brief of Amicus to William Bruce Work and Edward J. Dee, Assistant Attorneys General, at 7141 Cleanwater Dr. SW, Olympia WA 98501-0124 on October 8, 2010.

I certify that I served a true and correct copy of the foregoing Brief of Amicus on Susan Kas and Regan Bailey at Disability Rights Washington at 315 5th Ave S Ste 850 Seattle, WA 98104-2691 and Eleanor Hamburger at Sirianni Youtz Meier & Spoonemore at 719 2nd Ave Ste 1100 Seattle, WA 98104-1709 by US mail, postage prepaid on October 8, 2010.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Signed at Olympia, Washington on October 8, 2010.

Amy L. Crewdson

APPENDIX A

NO. 45275

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MAVIS BERRY, BONNIE HADEEN, GERTRUDE PIERCE, GENEVIEVE GALLOW, MAGGIE LEE FERRILL and CAROL POE,

Respondents,

vs.

MILTON BURDMAN, Acting Secretary of the Department of Social and Health Services; ROBERT QUERRY, Chief of the Office of Support Enforcement,

Appellants.

APPEAL FROM THE SUPERIOR COURT

FOR KING COUNTY

THE HONORABLE NANCY ANN HOLMAN, JUDGE

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ASSIGNMENTS OF ERROR AND ISSUES

This matter was decided by the King County Superior Court on the basis of a Motion for Summary Judgment and the Findings of Fact and Conclusions of Law entered therein (CP) are superfluous under the holding of Duckworth v. The City of Bonney Lake, 91 Wn.2d 19 (1978). However, to the extent they may be appropriate, the appellants assign error to Findings 66 and 70.

1. The appellants assign error to paragraphs 4, 5 and 6 of the Summary Judgment (CP) which provide that the appellants' policies and regulations violate the Social Security Act, federal regulations promulgated under the Act, and the equal protection and due process clauses of the United States and Washington State Constitutions, and which enjoin the appellants from continuing those policies.

This assignment of error involves the issue of whether the appellants' policy of deleting the needs of the caretaker relative from the AFDC grant and paying the family's remaining proportion to a protective payee because of the caretaker relative's failure to turn over support payments to the Department's Office of Support Enforcement after

an assignment of support rights has been made or because the recipient fails to comply with an agreement promising to pay the Office of Support Enforcement the amount of support retained violates (a) the Social Security Act, (b) the federal regulations promulgated under the Act, (c) the equal protection and due process clauses of the United States and Washington State Constitutions.

2. The appellants assign error to paragraphs 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 which relate to particular relief awarded to the named plaintiffs and class members, which involved the same issues described in Assignment of Error No. 1.

3. The appellants assign error to paragraph 23 of the Summary Judgment and the Order Awarding Attorney's Fees. This involves the issue of whether any attorney's fees should be awarded to the respondents even in the event of a determination that they are the prevailing parties in view of the good faith effort of the appellants to comply with its understanding and interpretation of the federal requirements, which was fully approved and sanctioned by the U.S. Department of Health, Education and Welfare, the agency administering this federal program.

II

STATEMENT OF THE CASE

Although the Findings of Fact are superfluous, in this instance, the appellants do not challenge them with the exception of 66 and 70.

As stated in Finding of Fact No. 72 (CP):

> "The named plaintiffs signed OSE Assignment of Support Rights Form DSHS 14-119 as follows: Bonnie Hadeen-April 12, 1976; Benevieve Gallow-August 19, 1975; Mavis Berry-May 29, 1974; Maggie Lee Ferrill-August 28, 1975; Gertrude Pierce-June 25, 1975 and November 3, 1975; and Carol Poe-September 1, 1975 and October 20, 1975. Paragraph No. 2 states:
>
> > 'I agree to send or deliver to an office of the Office of Support Enforcement designated by the Department of Social & Health Services all support payments from the above-named absent parent which may come into my possession during the time I receive public assistance to or for the benefit of my children.'"

All of the named plaintiffs came into possession of support payments from the absent responsible parents during the time public assistance was being received after signing the assignment of rights.

All of the named plaintiffs were affected by Department of Social and Health Services regulations WAC 388-14-200 and 388-33-453, which provide in part that as a condition of eligibility for Aid to Families With Dependent Children public assistance

cooperation of the recipient is required; and that a failure to cooperate in obtaining of support payments by remittance of all support payments received by the applicant/recipient from any person or agency to the Office of Support Enforcement results in the caretaker/relative being ineligible to receive assistance, and any assistance for which the children may be eligible shall be provided by protective payments as specified in WAC 388-33-453. The determination of requirements for the children are completed without regard to the requirements of the caretaker/relative.

Subsection (4) of WAC 388-14-200 provides that if protective payments have been established without regard to the requirements of the caretaker relative, the Office of Support Enforcement may enter into a written agreement with such caretaker relative for satisfaction of the obligation of remittance of support payments by monthly installments not less than ten percent of the original amount not remitted, and thereby restored to grant status. These regulations are attached as Appendix A.

Bonnie Hadeen, Gertrude Pierce and Genevieve Gallow had administrative hearings which resulted in decisions upholding the Department's policy.

Those administrative decisions were appealed to the superior court.

A class action was certified to include:

> All former, present and future AFDC recipients in the State of Washington whose public assistance benefits have been, are being, or may be reduced and who have been, are being or may be required to have the remaining portion of the family's AFDC grant paid to a protective payee, because of their failure to turn over support payments to the Office of Support Enforcement, Department of Social & Health Services, including those recipients who have or may sign agreements promising to repay to the Office of Support Enforcement the amount of support retained, in order to avoid reduction of their grant or set aside payment to a protective payee.

Several affidavits were submitted on behalf of the respondents and controverted by affidavits on behalf of the appellants (Department).

A preliminary injunction was entered by the King County Superior Court on November 28, 1977 (CP), enjoining the enforcement of the Department's regulations in this regard.

The matter was thereafter heard on summary judgment resulting in Findings of Fact and Conclusions of Law, Summary Judgment, Order Administering Class Relief and Order Awarding Attorney's Fees being entered by the King County Superior Court on November 17, 1978 (signed November 14, 1978) (CP).

Notice of Appeal from the November 28, 1977 preliminary injunction was filed December 22, 1977; (CP) and Notice of Appeal from the Summary Judgment, Order Administering Class Relief and Order Awarding Attorney's Fees entered on November 17, 1978 was dated November 29, 1978 and filed on December 1, 1978. (CP).

III

ARGUMENT OF COUNSEL

A. Introduction

This case involves conditions of eligibility for participation in the public assistance program of Aid to Families With Dependent Children.

The AFDC program was established by the Social Security Act of 1935. It is based on a scheme of cooperative federalism. It is administered by the states and financed in part by matching funds from the federal government. States are not required to participate in the program, but those who desire to take advantage of federal funding must submit a plan with the U.S. Department of Health, Education and Welfare which conforms to certain requirements of the Social Security Act and with the rules and regulations promulgated by HEW. King v. Smith, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128

(1968), Townsend v. Swank, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971), Anderson v. Morris, 87 Wn.2d 706, 558 P.2d 155 (1976).

B. The Defendants' Regulations are Consistent With and Satisfy The Requirement of The Social Security Act And Implementing Regulations of HEW.

1. Social Security Act

The 1974 social services amendments to the Social Security Act (P.L. 94-647) made significant changes in the AFDC program. New eligibility requirements were imposed upon applicants and recipients as a condition of receiving assistance.

42 U.S.C. § 602(a) establishes the basic criteria which must be included in a state plan for AFDC under the Social Security Act. Subsection (26) sets forth the new eligibility requirements provided in P.L. 93-647 and states that a plan under the AFDC program must

> "provide that, as a condition of eligibility for aid, each applicant or recipient will be required--
>
> (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed.
>
> (B) to cooperate with the State (i) in establishing the paternity of a child born

> out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section (406(b)(2) (without regard to subparagraphs (A) through (E) of such section);"

Part (A) requires each applicant or recipient as a condition of eligibility to assign to the Department of Social and Health Services any support rights they may have which have accrued at the time such assignment is executed.

Part (B) of 42 U.S.C. § 602(a)(26) requires, as a condition of eligibility, that an applicant or recipient cooperate in obtaining support payments to the dependent child. If the relative with whom the child is living is found to be ineligible because of failure to comply with Parts (A) and (B), any aid for which the child is eligible will be provided in the form of protective payments.

It has been often held that HEW has broad authority to promulgate regulations binding upon the states. Arizona State Department of Public Welfare v. Department of Health, Education and Welfare, 449 F.2d 456 (1971), cert.den. 405 U.S. 919. Accord, Batterton v. Francis, 432 U.S. 416, 53 L. Ed. 2d 448, 97 S. Ct. 2399 (1977).

In any event, the superior court did not decide that HEW exceeded its statutory authority to promulgate regulations; nor did it invalidate the HEW regulations in any way. Therefore, the primary question is whether the DSHS policy is consistent with the federal regulations.

2. HEW Regulations

45 C.F.R. §§ 232.11 and 232.12 were promulgated by the Department of Health, Education and Welfare pursuant to the above provisions in the Social Security Act. Section 232.11 describes the assignment requirements that must be followed as a condition of eligibility for AFDC. Section 232.12 specifies the requirements of cooperation which must be satisfied as a condition of eligibility for AFDC.

At all pertinent times involved with the case at hand, the following language was included within § 232.12:

"The State plan must provide that:

(a) As a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate with the State in:

***

(b) 'Cooperate' includes the following:

***

(4) After an assignment under § 232.11 has been made, paying to the child support agency any child support payments received from the absent parent which are covered by such assignment.

(c) If the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency shall act upon such information in order to enforce the eligibility requirements of this section.

(d) If the relative with whom a child is living fails to comply with the requirements of paragraph (a) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(e) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a) of this section, any aid for which such child is eligible (determined without regard to the needs of the caretaker relative) will be provided in the form of protective payments as described in § 234.60 of this chapter."

Section 232.12 was reaffirmed by HEW as a result of the promulgation of additional regulations relating to "cooperation" in Vol. 43, No. 10, January 16,

1978 Federal Register, effective March 17, 1978. Subsection (b)(4) now reads: "Paying to the child support agency any child support payments received from the absent parent after an assignment under § 232.11 has been made."

The full text of 45 C.F.R. § 232.11 and 232.12 in their prior and present form are attached as Appendix B.

It is acknowledged that, in view of Townsend v. Swank, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971), a state cannot impose eligibility standards that exclude persons eligible for assistance under the federal AFDC standards. This court acknowledged Townsend, and concluded in Anderson v. Morris, 87 Wn.2d 706, 709:

> "AFDC, which was created by U.S.C. §§ 601-10, is a joint federal-state program involving federal funding and state administration. A state need not participate in the program but if it does, then the state system must be consistent with the federal legislation creating the program and the federal rules and regulations implementing it."

The State of Washington Department of Social and Health Services enacted regulations WAC 388-14-200 and 388-33-453 for the sole purpose of complying with the foregoing federal requirements.

That portion of the state regulations which involve the remittance agreements is, of course, not addressed specifically in 45 C.F.R. § 232.12. This was an effort by the Department Office of Support Enforcement to minimize the impact of this federal regulation by providing some means of accommodation under the circumstances. It is again recognized that the state regulations must be consistent with the federal requirements and this was simply an attempt to apply those federal requirements in an acceptable manner. There has been no written expression by the U.S. Department of Health, Education and Welfare that this provision is inconsistent with the federal regulations and HEW has approved the state's plan that includes these regulations.

The respondents (the named plaintiffs) satisfied the eligibility requirement set forth in 45 C.F.R. § 232.11 by executing the assignments of support as described in Finding of Fact No. 72 (CP), paragraph 2 of which states:

> "I agree to send or deliver to an office of the Office of Support Enforcement designated by the Department of Social and Health Services all support payments from the above-named absent parent which may come into my possession during the time I receive public assistance to or for the benefit of my children."

This assignment results in the applicant or recipient transferring a property right in the support payments to the state which is no longer owned by the assignor. Any support payment thereafter received directly by a recipient and not remitted to the Office of Support Enforcement constitutes a breach of contract and a retention of property not belonging to them.

The respondents did not satisfy the eligibility requirement of 45 C.F.R. § 232.12, since they failed to pay to the Office of Support Enforcement child support payments received from the absent parent which were covered by the assignment.

The King County Superior Court judgment concludes that the state regulations are in violation of the federal regulations. We respectfully submit that this conclusion is in error in view of the express provisions of 45 C.F.R. § 232.12. This provision is clear, absolute and unequivocal. It provides that after assigning support rights under § 232.11, any failure to pay to the Department of Social and Health Services any monies received by the caretaker relative from the absent parent will result in a deletion of the needs of such caretaker relative from the AFDC grant and the children's portion will

be payable to a protective payee for the purposes of the children.

To interpret this regulation in any other way would render it meaningless and totally ineffective.

Any argument that this regulation is satisfied by simply "promising" to turn over payments in the "future" has no merit whatsoever. Under such a contention, regardless of any failure to remit a support payment, if the recipient promised to turn over support payments in the future, his or her eligibility would not be affected. If it should occur in the "future" that payments were received by the recipient and not turned over to the Office of Support Enforcement, then they would, upon discovery, become "past" payments and the recipient would simply have to renew the promise to turn over payments again in the "future" in order to maintain the eligibility.

It is recognized that these new provisions in the federal law contemplate that child support should be made directly to the child support agency. This is precisely the reason that the recipient should not retain payments when they are made directly to him or her. Regardless of the responsibilities of the support agency to institute certain procedures,

the primary responsibility of the recipient to comply with the assignment she has signed as a condition of eligibility cannot be avoided.

The U.S. Department of Health, Education and Welfare has accepted the policy of the state Department of Social and Health Services contained in WAC 388-14-200 as evidenced by the plan approval dated December 31, 1975 (CP). In New York Department of Social Services v. Dublino, 413 U.S. 405, 37 L. Ed. 2d 688, 93 S. Ct. 2507 (1973), it was concluded that the court should not lightly interfere in the difficulties of the states in the welfare field and it was stated:

> "The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution."

It was also held in Lewis v. Martin, 397 U.S. 552, 25 L. Ed. 2d 561, 90 S.Ct. 1282 (1970), that HEW is to be given the deference due the agency charged with the responsibility of administering the act in question.

In this regard, the Deputy Director of the Office of Child Support Enforcement of the Department of Health, Education and Welfare in Washington,

D.C. advised the Chief of the Office of Support Enforcement of the Department of Social and Health Services by letter received dated December 8, 1977, that the preliminary injunction entered by the King County Superior Court in this case could cause the State of Washington difficulties including "a possible audit penalty, a conformity hearing (which could cause a loss of all Title IV-A funds), and a loss of federal financial participation (with respect to specific payments)." The letter addresses the requirement of cooperation in 45 C.F.R. § 232.12(b)(4) and states:

> "Federal regulations further require that failure to so cooperate must result in removing the needs of the non-cooperating recipient from the grant, and making any payments in the case by means of protective payment."

This is a clear expression by the No. 2 HEW official administering the child enforcement program for HEW that the policy of the Department of Social and Health Services is not only consistent with the federal requirements but that a failure to follow such policy might result in a substantial loss of federal funding. This is, of course, an opinion of one official and is certainly not binding upon the court, but should be given considerable weight in view of the deference that it should be

given to the agency charged with the administration of the program. A copy of this letter is attached as Appendix C.

C. There is no Violation of the Equal Protection or Due Process Clauses of the United States or Washington State Constitutions.

The constitutional issue should be considered in light of the well-recognized principle that any person challenging the constitutionality of certain provisions carry a heavy burden of overcoming the strong presumption of constitutionality by demonstrating their invalidity beyond a reasonable doubt. Harbert v. State, 85 Wn.2d 719, 539 P.2d 1212 (1975), State v. Kent, 87 Wn.2d 103, 549 P.2d 721 (1976), Salstrom's Vehicles, Inc. v. Department of Motor Vehicles, 87 Wn.2d 686, 555 P.2d 1361 (1976), and Homes Unlimited Inc. v. City of Seattle, 90 Wn.2d 154, _____ P.2d _____ (1978). There is also a presumption that agency rules and regulations are valid and the burden lies with the person attacking the agency rule. Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976) and Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976).

The test for measuring a constitutional challenge in this regard was set forth in Dandridge v. Williams, 397 U.S. 471, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970).

The court recognized that the administration of public welfare assistance involves the most basic economic needs of impoverished human beings, but concluded that state action in this program could withstand the challenge of denial of equal protection if its action is rationally based and free from invidious discrimination. This was followed by another case involving the AFDC program, Jefferson v. Hackney, 406 U.S. 535, 32 L. Ed. 2d 285, 92 S. Ct. 1724 (1972), in which it was stated at p. 546 that so long as the state's judgments were rational and not invidious, "***'the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight jacket.'" This general test has been reaffirmed in the recent cases of Maher v. Roe, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), Califano v. Torres, ___ U.S. ___, 55 L. Ed. 2d 65, 98 S. Ct. _____ (1978), and Califano v. Aznavorian, ___ U.S. ___, 58 L. Ed. 2d 435, 98 S. Ct. _____ (1978). It was held in the latter case:

> "Social welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. This Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress's choice."

It was also concluded therein that the constitutionality of legislative provisions does not depend upon compelling justifications and that it is enough that the provision in question is rationally based.

The Dandridge v. Williams test has been applied by this court. Stepparents v. Smith, 85 Wn.2d 564, 536 P.2d 1202 (1975).

The respondents will identify differences between the remittance agreements in question and the procedures for recoupment of "overpayments". The "remittance agreement" which provided an opportunity for the caretaker relative's needs to be restored to the grant involved a remittance of ten percent of the total amount involved per month. In the instance of "overpayment", the Department's current regulations provide that there will be no reduction of current grants of public assistance in the event of "nonwillful overpayments"; and there can be a reduction of current grants of assistance to recoup "willful overpayments" not to exceed ten percent of the total monthly requirements for assistance, with consideration for undue hardship on a case-by-case basis.

This distinction appears to be the basis for the superior court's conclusion of unconstitutionality.

The trial court was concerned that the ten percent of the total amount per month allowed by the state was too severe.

The issue is one of eligibility, not overpayment. The federal law is clear as to the effect of failing to cooperate; the needs of the caretaker relative are deleted and protective payments are established for the children's portion of the grant. Therefore, the primary question is what constitutes failure to cooperate rather than what the effect of failing to cooperate may be. If the federal law provided that an overpayment should be established and that regular procedures for recouping overpayments were applicable in the event that a person failed to cooperate, then, of course, such provisions would be applicable. However, this is not the situation since the effect of failing to cooperate is clearly delineated otherwise. Support money, under the new revisions to the federal law, is no longer treated as "income" to the recipient but rather becomes the property of the state by virtue of the assignment. The caretaker relative becomes a fiduciary trustee of such monies and a failure to turn them over to the Office of Support Enforcement results in a failure to satisfy a specific eligibility requirement.

As previously noted, the opportunity of a caretaker relative to enter into a remittance agreement of the money which had been assigned to the Department was an option available to such person which was not expressly addressed in the federal regulation.

Even assuming for the purpose of argument only, that the Department's efforts to minimize the impact of the federal law by implementation of the remittance agreement is founded upon some unconstitutional premise, or not valid for whatever reason and totally removed from consideration, the federal regulation would still be applicable. 45 C.F.R. § 232.12 clearly provides that the failure to turn over any assigned support money must result in deletion of the needs of the caretaker relative and the establishment of protective payments for the child's portion of the grant. This regulation has not been declared to be unconstitutional and we submit that, absent the remittance agreement procedure, the state regulation cannot be unconstitutional without the federal regulation being unconstitutional. In any event, we submit that this federal regulation does not constitute invidious discrimination since it is based upon a clear intent to recognize the need for establishing the consideration of child support

money for public assistance purposes in a certain manner. This includes the factor of eligibility of turning over assigned support, the failure of which results in the children's grant being paid to a protective payee. The federal provisions specifically protect the children's portion of the grant. In no event are more than the caretaker's needs involved.

The deleted portion of the caretaker's needs is not credited toward reducing the amount of support money retained which was not turned over to the Office of Support Enforcement, since this is a factor of eligibility mandated by this federal law.

As held in Everett v. Fire Fighters, 87 Wn.2d 572, 555 P.2d 418 (1976) at p. 576:

> "Equal protection of the law forbids all invidious discrimination but does not require identical treatment for all without recognition of difference in relevant circumstances."

Accord, Moran v. State, 88 Wn.2d 867, 568 P.2d 758 (1977).

Everyone within the classification of persons who fail to turn over assigned support money is treated alike. To the extent that persons who fail to cooperate resulting in the loss of eligibility may be treated differently than those persons who

are involved with overpayments of public assistance, there is no invidious discrimination since the federal law provides a reasonable basis for establishing specific eligibility requirements relating to the receipt of child support payments.

We submit that the issue is, if anything, one of the wisdom of the federal provisions rather than their constitutionality. This court has held that it is not within the province of the court to determine the wisdom of the law. Powerhouse Engineers v. State, 89 Wn.2d 177, 570 P.2d 1042 (1977).

Although the superior court concluded that the questioned policy also violated the due process clauses of the state and federal constitutions, there does not appear to be any specific argument that was presented by the respondents independent of the equal protection issue. We therefore submit that this is not a separate issue before the court and that in any event we would request the opportunity to respond further to it, should it be deemed appropriate.

D. Issue of Attorneys' Fees.

The primary case involving the appropriateness of an award of attorneys' fees to a prevailing party under RCW 74.08.080 is Tofte v. Department of Social

and Health Services, 85 Wn.2d 161, 531 P.2d 808 (1975). It was held therein on p. 165:

> "We conclude that the fundamental underpinning of the fee award provision is a policy at once punitive and deterrent--a corrective policy which would discipline respondent for violations of Title 74 RCW or of its own regulations, by shifting to the respondent the costs of righting its mistakes."

We submit that this case did not involve a matter of a need for correcting "mistakes" of the Department which would activate a disciplinary corrective policy. The Department was only attempting to satisfy the federal requirements necessary to obtain matching funds for the AFDC program which were sanctioned by the federal agency responsible for the program.

We submit that the King County Superior Court decision on the merits should be reversed. However, even if it should be determined that the respondents are the prevailing parties, no award of attorneys' fees should be made since "the fundamental underpinning of the fee award provision" is lacking.

IV

CONCLUSION

We submit that the decisions of the King County Superior Court in this matter should be reversed and this action dismissed.

DATED this 14th day of February, 1979.

Respectfully submitted,

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Attorneys for Appellants

APPENDIX B

> (2) Payments of assistance made to carry out hearing decisions ....
>
> (3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

45 C.F.R. §205.10(b)(2),(3). Thus, there is no possibility that a court order could jeopardize the state's claims to federal matching funds.

IX. THE PLAINTIFFS ARE ENTITLED TO REASONABLE ATTORNEY'S FEES

The Department argues that the trial court erred in awarding reasonable attorney's fees to plaintiffs (Appellants' Brief, pps. 23-4). Plaintiffs brought this action under RCW 74.08.080 which provides that if the recipient prevails she "shall be entitled to reasonable attorney's fees and costs." The statute is mandatory and provides for no exceptions based on a defense of good faith.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted on March 23, 1979.

Tony Lee

TONY LEE
Attorney for Respondents